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NO. 92-1382

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MEDALLION OIL COMPANY, et al.,
Petitioners,

v.

TRANSAMERICAN NATURAL GAS CORPORATION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS AND THE COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court, pursuant to its supervisory power as exercised in *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), should reverse the lower court for refusing to certify an admittedly unresolved question of Texas law to the Supreme Court of Texas instead of deciding that question and thereby undermining the viability of all overriding royalty interest in Texas oil, gas and other minerals?

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AMICUS CURIAE BRIEF OF THE STATE OF TEXAS AND THE COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the State of Texas files this brief as an amicus curiae on behalf of its citizens and, more particularly, Garry Mauro, the Commissioner of the General Land Office of the State of Texas. The State of Texas ("Texas") supports the position of petitioners in requesting the Court to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for the purpose of guiding all circuit courts of appeal in the federal certification process.

INTEREST OF THE AMICUS CURIAE

Texas has a substantial sovereign interest in the stability and consistency of the law governing lands within her

boundaries. This is particularly true when state law either has been the subject of no or limited interpretation, or is unclear due to conflicting interpretations by the state courts. Stability and consistency are well served by federal court certification of unsettled or novel issues of state law to a state's highest court.

The Commissioner of the Texas General Land Office has an interest in consistent state law regarding public lands. The Commissioner is the state official charged with the principal constitutional and statutory responsibility for managing Texas' public lands and minerals. In accordance with the terms upon which Texas joined the Union, Texas retained ownership of its public lands.[1] As a result, Texas owns several million acres of mineral lands, both upland and offshore, and enjoys a substantial oil and gas revenue from these lands.[2] An extensive and complex system of constitutional, statutory, and regulatory law governs the terms under which the state develops and manages this state-owned resource. Because Texas' public lands were never subject to federal jurisdiction, virtually all of this system is unique to Texas.

Texas holds only a very small number of overriding royalty interests such as the one that is the subject of this case. Considering this fact, Texas neither espouses nor holds a position with respect to the underlying question of state law involved in the present case, other than to note that it is a significant issue for private parties in the oil and gas industry.

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[1] Treaty of Annexation, March 1, 1845, United States-Texas, 5 Stat. 797.

[2] From 1983 through 1992, the total oil and gas royalty income paid to the Permanent School Fund, the recipient of most of the revenue from state-owned minerals, was approximately two billion dollars. REPORTS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, ANNUAL FINANCIAL REPORTS, REPORT GL50R, 1993. The General Land Office also manages substantial real estate interests to which the same considerations as those relevant to mineral interests apply.

However, Texas does have an intense interest in unsettled state law being decided by its own courts.

Texas has a particular concern in the utilization of the certification process because Texas conducts a substantial amount of litigation affecting its public lands in the federal bankruptcy courts. The poor economic condition of the energy and real estate industries in recent years has forced many Texans to the bankruptcy forum. The state's presence in the federal courts as a party frequently thrusts these courts into issues that are exclusively those of state law.[3] This is particularly true in cases involving Texas public lands, where reference to the federal public land law that underlies the public land law of many other states is not available. Moreover, as illustrated by the facts of this case, the dominance of state law issues is prevalent in cases involving other aspects of real property and mineral law even when the state is not a party.

SUMMARY OF ARGUMENT

This Court should review the law governing the use of certification of state law questions to the state courts and provide guidance to the federal courts on the proper use of the procedure to promote comity and to allow the states to direct the development of their own laws, especially in those areas, such as natural resource law, that historically and constitutionally are peculiarly state law.

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[3] One of the examples available involves the 1919 Texas statute that gives the state a first lien on oil and gas production from its lands to secure the payment of royalty and other sums due under state leases. TEX. NAT. RES. CODE ANN. §52.136 (Vernon 1978). Remarkably, this statute has never been interpreted by any appellate court. Nonetheless, the issue of the priority of the lien arising under this statute vis-à-vis liens created by other state statutes (such as the Texas version of the Uniform Commercial Code) is present in virtually every bankruptcy case in which oil and gas royalties are owed to the State.

ARGUMENT

The federal courts have been required to interpret and apply state law since *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938). Although simple in concept, this command has not proven simple to carry out.[4] The availability to federal courts of the option of certification has expanded in response to the need for the federal courts to obtain correct interpretations of state law issues.[5] The circuit courts of appeal can use certification effectively to apply state law, and the commentators have been widely supportive of its use.[6]

Texas urges this Court to take the opportunity presented by this case to review the law on the certification process and provide guidance for its use. Despite the expansion in the number of states that authorize their highest courts to respond to requests for certification, this Court has not provided instruction on the use of certification since *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).[7] Invocation of the process is within the discretion of a federal court, should remain so, and should not become obligatory.

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[4] Witness the large volume of cases and commentary flowing from *Erie*. 19 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4501-4515 (1988 & Supp. 1992).

[5] Certification of law questions has been available within the Texas judicial system for over one hundred years. TEX. R. APP. P. 110-113. The practice is usually employed only with reference to "controlling questions" of "general importance throughout the state." *City of Stamford v. Ballard*, 162 Tex. 22, 344 S.W.2d 861 (1961).

[6] *See* authorities cited in Petition for Writ of Certiorari at 11 n.5, *Medallion Oil Company v. Transamerican Natural Gas Corporation*, No. 92-1382, *petition for cert.* filed February 19, 1993.

[7] In 1974, only nine states had certification procedures. *Lehman Brothers v. Schein*, 416 U.S. at 390 n.7. Today, thirty-nine states provide for certification. 18 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE §4248, n.30 (1988 & Supp. 1992). Texas has authorized the procedure since January 1, 1986. TEX. CONST. art. V, §3-C.

However, this Court's guidance on the exercise of that discretion will strengthen comity and allow unsettled state law questions to be decided in the best forum, the state's highest court. The Court's endorsement of certification in *Schien* was a necessary beginning, but, in view of the current wide availability of the procedure, *Schien's* brief directions on when certification should be utilized need to be expanded.

Two completely opposite dispositions, in less than a year, of requests made to Fifth Circuit panels for the certification of unsettled state oil and gas law questions illustrate the need for this Court's guidance. The first of the pair of cases is this very case, in which the panel of three "outsiders," as described in *Schein*, 416 U.S. at 391, failed to certify despite its conclusion that neither of the Texas cases on the termination of overriding royalty interests was controlling. *Medallion Oil Co. v. Trans-American Natural Gas Corp.*, 979 F.2d 40, 41 (5th Cir. 1992) (opinion on rehearing). However, less than a year before the final opinion in the present case was handed down, a panel of three Texas "outsiders," acting on a motion for rehearing, certified a similarly unsettled issue of Louisiana oil and gas law to the Louisiana Supreme Court. *Frey v. Amoco Production Co.*, 951 F.2d 67 (5th Cir. 1992).

The *Frey* panel, even though seemingly more certain of the correctness of its original opinion than the panel in this case, recognized the importance of consistency in state mineral law, as indicated by their opinion certifying the question:

> While we continue to believe in the propriety of our rationale and its consequence, . . . the precise meaning of the royalty clause at issue in this suit carries tremendous consequences for Louisiana's gas industry and its citizens who own mineral interests in Louisiana real estate.

951 F.2d at 67.

This disparate treatment in the circuit that is the home of the federal-state certification procedure disregards the desirability of having a uniform procedure for the certification of questions of unsettled state law.[8] It fails to meet the need for consistency in interpretation of state natural resource law and to respect the traditional deference that the federal courts show to the state courts in this peculiarly local field of law.[9]

The strength of this Court's regard for the interest of states having the opportunity to interpret their own natural resource law is apparent in the prominent role that natural resource cases have taken in the development of the various branches of the abstention doctrine.[10] Similar regard for

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[8] The origins of federal-state certification are discussed at 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE §4248 (1988 & Supp. 1992).

[9] The uniquely local nature of mineral law is apparent especially in the wide variation among the states on a fundamental question: What type of legal creature is oil and gas? A leading treatise, Oil and Gas Law by Williams & Meyers, devotes approximately five hundred pages to the topic "Nature of Interests in Oil and Gas." 1 WILLIAMS & MEYERS, OIL AND GAS LAW §201 (1992) (including state-by-state summaries on each aspect of the topic).

Thus, a judge from a different jurisdiction, even if thoroughly familiar with the "home" state mineral law, could approach oil and gas issues arising under the law of another jurisdiction from a perspective that is completely foreign to the state law under review.

As a further example of the multiplicity of oil and gas law, Texas has long considered an oil and gas "lease" to be a fee simple determinable conveyance of oil and gas in place, *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923), but this long-established principle has been the subject of intense bankruptcy court battles. *Good Hope Refineries, Inc. v. Benavides*, 602 F.2d 998 (1st Cir.), *cert. denied*, 444 U.S. 992 (1979); *In re: Balcones Oil Co.*, 21 Bankr. 26 (Bankr. W.D. Texas 1981).

[10] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (state regulation of oil production); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940) (determination of mineral ownership in bankruptcy setting).

state sovereignty in areas affecting natural resources is apparent in cases involving choice between federal and state law.[11] The appropriate use of the certification process by federal courts serves the same interests that this Court has recognized in these related areas.

Clear direction from this Court on the use of the certification process will enable the circuit courts of appeal to honor the interests of the states in retaining control over the development of their own laws. Wise guidance will affirm the inherent right of a state's highest court to speak on questions of unsettled state law.

CONCLUSION

The State of Texas, as an amicus curiae, urges the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and set this cause for briefing and oral argument.

Respectfuly submitted,

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[11] *See Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977) (state law governs location of riparian boundary of pre-statehood federal patent).

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